



Commonwealth of Massachusetts State Ethics Commission

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SUFFOLK, ss.

COMMISSION ADJUDICATORY
DOCKET NO. 618

IN THE MATTER
OF
WILLIAM J. MALONEY Jr.

DISPOSITION AGREEMENT

The State Ethics Commission and William J. Maloney Jr. enter into this Disposition Agreement pursuant to Section 5 of the Commission's *Enforcement Procedures*. This Agreement constitutes a consented-to final order enforceable in the Superior Court, pursuant to G.L. c. 268B, §4(j).

On November 17, 1999, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Maloney. The Commission has concluded its inquiry and, on October 18, 2000, found reasonable cause to believe that Maloney violated G.L. c. 268A, §19.

The Commission and Maloney now agree to the following findings of fact and conclusions of law:

I. Introduction

1. At all times here relevant, Maloney was a Walpole selectman, having been elected to that position in 1991.

2. In addition, at all times here relevant, Maloney was a licensed real estate broker and independent contractor who had contracted to sell real estate for Walsh Construction ("Walsh"), a subdivision developer in Walpole. Maloney had worked for Walsh since 1975 and, by agreement, was the exclusive real estate broker for Walsh in Walpole. For each subdivision, Walsh granted Maloney a power of attorney to execute and deliver all necessary closing documents and to receive the sale proceeds from the buyers. Maloney received an 8% commission on each sale, which accounted for the majority of his annual income during the time relevant.

3. On at least three occasions between June 1996 and January 1999, the Ethics Commission warned Maloney not to participate as a selectman in either discussions or votes concerning matters in which Walsh might have financial interests. In October 1997 and January 1999, after receiving advice from the Ethics Commission, Maloney filed disclosures with the town stating that he was the exclusive broker for Walsh and that his income from Walsh was solely derived from the sale of house lots.

II. Article 48

4. In 1990, the town enacted a subdivision phase by-law (§ 9-I), which provided that an applicant “may not receive building permits for a subsequent development phase until the previous development phase is completed.” The by-law defined “development phase” as the period of construction within a subdivision phase beginning with the issuance of the first building permit and ending with the issuance of the last occupancy permit.¹

5. In late 1998, the town, through its board of selectmen, received a petition proposing an amendment to the subdivision phase by-law, redefining the meaning of “development phase.”² Neither Walsh nor Maloney were involved in the promotion of the by-law amendment.

6. On February 18, 1999, the planning board voted 3-0-0 to approve what had become known as Article 48: to amend the definition of “development phase” to allow the issuance of a building permit in a subsequent subdivision phase if *all but one* occupancy permit had been issued in the prior phase.

7. On March 15, 1999, the finance committee voted to amend Article 48 to allow the issuance of building permits for a subsequent phase after all but two occupancy permits had been issued for the earlier phase, and to recommend the article to town meeting.

8. On March 30, 1999, Article 48, as amended and approved by the finance committee, came before the selectmen for review and recommendation to town meeting. At that meeting, Maloney discussed the matter from his seat at the selectmen’s table. Maloney spoke for several minutes, giving some history on the current interpretation of the by-law and the intended effect of the proposed change. In particular, he explained how the current interpretation of the by-law caused developers to speed up their construction, even though the town had enacted the by-law to control and slow growth. Maloney stated that the amendment would provide some relief and that he “would support it.”

9. After Maloney had spoken on the matter, the selectmen voted 2-1-1 to recommend favorable action on Article 48. Maloney abstained from the vote.

10. The selectmen’s vote to recommend Article 48 for favorable action was presented to town meeting prior to its vote on the matter, as was the usual practice with respect to most town meeting warrant articles. On April 12, 1999, town meeting passed Article 48 as amended by the finance committee and recommended by the selectmen. The amendment took effect immediately.

11. Other than participating in the discussion at the selectmen’s meeting on March 30, 1999, Maloney had no official involvement in Article 48.

III. Maloney's Financial Interest in Article 48

12. Many of the subdivisions that Walsh developed in Walpole were developed in two or more phases, with seven or eight lots in each phase. Walsh sold the lots without houses built on them. As Walsh's agent, Maloney finalized the sales (i.e., conducted the closings) only when the lots in question were capable of receiving building permits. Maloney received his 8% commission after obtaining the sale proceeds from the buyer at the closing and delivering the money to Walsh. At all times relevant, Maloney was aware of how many building permits were allowed each year for each subdivision phase.

13. Maloney never sold more than ten lots per year for Walsh, a limitation imposed by Walsh. In 1997, Maloney sold nine lots for Walsh and, in 1998, Maloney sold ten lots for Walsh.

14. In the beginning of 1999, Walsh had 16 lots available for sale in Walpole, including all eight lots in the third and final phase of the Northwood III subdivision ("Phase 3"). Maloney had executed purchase and sale agreements on two of the Phase 3 lots in December 1998, with the closings set for June 1, 1999.

15. Under the pre-Article 48 subdivision phase by-law then in effect, a building permit for a lot in Phase 3 could not be issued until *all of the occupancy permits* for Phase 2 of Northwood III ("Phase 2") were issued. Phase 2 was the subdivision phase immediately preceding Phase 3 in the Northwood III subdivision. Walsh had already sold all of the lots in Phase 2, but the owners had not completed building on those lots and, as of March 30, 1999, three houses in Phase 2 had not received occupancy permits. One of those houses was almost complete (and, in fact, received its occupancy permit in early May 1999), but the other two were far from complete: one house consisted only of a foundation, and the other house was just short of rough-frame approval. Thus, under the pre-Article 48 by-law, Maloney could not close on any of the eight lots in Phase 3 until the three remaining occupancy permits for Phase 2 were issued. As a result, Maloney's sales inventory for 1999 was reduced from 16 lots to eight (16 total lots minus the eight Phase 3 lots), which meant two fewer potential sales for 1999 than his allowable limitation of ten.

16. Neither Walsh nor Maloney had any control over the speed with which the houses in Phase 2 were constructed. Nevertheless, when Maloney spoke at the March 30, 1999 board of selectmen's meeting, he was aware of the status of construction in Phase 2, and he knew that, under the pre-Article 48 by-law, he would not be able to close on the Phase 3 lots until the three remaining occupancy permits for Phase 2 were issued. If the pre-article 48 by-law were amended, then Maloney would be able to close on the two Phase 3 lots under agreement as soon as just one more occupancy permit for Phase 2 issued, and his total potential sales for 1999 would remain at 16 lots. Under that scenario, Maloney would be more likely to achieve his limitation of ten closings for 1999.

17. As described above, the by-law was amended in April 1999.

18. On May 7, 1999, the Phase 2 house that had been close to completion on March 30, 1999, received its occupancy permit.

19. As a result of the change in the by-law and the issuance of all but two occupancy permits in Phase 2, Maloney was free to conduct the closings on the lots in Phase 3, as those lots had now become eligible to receive building permits. On August 31, 1999 and October 22, 1999, Maloney closed on the two Phase 3 lots that had been under agreement since December 1998. On August 26, 1999 and November 2, 1999, Maloney closed on two other Phase 3 lots. If the by-law had not been amended, Maloney could not have conducted closings on *any* Phase 3 lots until after December 10, 1999, when the last occupancy permit for Phase 2 issued.

20. Maloney was able to conduct closings on a total of ten lots in 1999. As a result of the change in the by-law, these ten closings included four lots in Phase 3 that would not have otherwise been available for closings until after December 10, 1999.

21. For the foregoing reasons, the by-law amendment in part contributed to Maloney's earning \$148,000 in commissions and Walsh's receiving \$1,850,000 in sale proceeds for 1999.

IV. Legal Analysis

22. As a Walpole selectman, Maloney was at all times relevant a municipal employee as that term is defined in G.L. c. 268A, §1. As such, Maloney was subject to the provisions of the conflict of interest law, G.L. c. 268A.

23. Except as otherwise permitted,³ §19 of G.L. c. 268A prohibits a municipal employee from participating⁴ as such an employee in a particular matter⁵ in which to his knowledge he, a business organization by which he is employed, or an organization with whom he has any arrangement concerning prospective employment has a financial interest.⁶

24. Walsh is a business organization within the meaning of §19.

25. Maloney contracted to sell real estate for Walsh as Walsh's exclusive real estate broker in Walpole. Maloney's only "employment" compensation (as opposed to investment or retirement income) derived from his work as Walsh's exclusive real estate broker. Therefore, Walsh was Maloney's employer within the meaning of §19.⁷

26. The proposed by-law amendment known as Article 48 was a particular matter under consideration by the town in 1999.

27. Maloney participated in the Article 48 particular matter as a selectman by making an extensive statement on Article 48 prior to the selectmen's vote on March 30, 1999. In making his statement, Maloney stated his support for Article 48 because it would provide some relief from the status quo.⁸

28. When he participated in the particular matter, Maloney had a financial interest in reducing any delay in the receipt of his commissions. Upon the enactment of Article 48 in April 1999, Maloney was able to sell the first Phase 3 lots in August and October 1999, whereas under the old by-law he would have had to wait until at least December 1999. Thus, where Maloney's commissions were contingent upon his ability to close on the sale of a lot, and where the timing of those closings was contingent upon Article 48, Maloney had a financial interest in Article 48 when he so participated.

29. Maloney also had a financial interest in how many lots were available for him to sell that year. Thus, where the size of Maloney's available inventory for 1999 was contingent upon Article 48, Maloney had a financial interest in Article 48 when he so participated.

30. In addition, Walsh, Maloney's employer, had a financial interest in Article 48 because the by-law amendment allowed Walsh to receive the sales proceeds earlier than it would have under the old by-law.

31. Maloney understood the proposed by-law amendment well enough to know that its net effect would contribute to his being able to close on certain sales earlier, thereby affecting both his own and Walsh's financial interests. Thus, when Maloney participated in the March 30, 1999 discussion, he knew of his and Walsh's financial interests in the particular matter.

32. The Commission found reasonable cause to believe that Maloney had violated the conflict of interest law and authorized public proceedings on this matter for the following reasons. First, on at least three different occasions prior to March 30, 1999, the Commission warned Maloney not to participate in either the vote *or the discussion* on a matter in which Walsh might have financial interests. Certainly, Maloney's abstention from the vote on March 30, 1999, indicated that he knew that Article 48 was such a matter. Nevertheless, Maloney failed to abstain from the discussion. Second, the Commission believes that discussion without voting can be an effective advocacy tool providing more impact on a matter than would a single vote, depending on the circumstances. Indeed, in some situations, the discussion may be determinative of the vote. Under the circumstances described above, where the board appears not to have fully understood the import of the proposed amendment, Maloney's explanation and advocacy in favor of Article 48 may have had such an impact.

33. Accordingly, by participating as a selectman in the particular matter concerning Article 48 when he knew that he and/or Walsh had financial interests in that particular matter, Maloney violated §19.

V. Resolution

In view of the foregoing violations of G.L. c. 268A by Maloney, the Commission has determined that the public interest would be served by the disposition of this matter

without further enforcement proceedings, on the basis of the following terms and conditions agreed to by Maloney:

- (1) that Maloney pay to the Commission the sum of one thousand dollars (\$1,000) as a civil penalty for violating G.L. c. 268A, §19; and
- (2) that Maloney waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in this or any other related administrative or judicial proceedings to which the Commission is or may be a party.

Date: April 18, 2001

¹Specifically, § 9-I(2) of the by-law defined “development phase” as follows:

DEVELOPMENT PHASE - the period of time elapsed between the date of issuance of a building permit for the first dwelling eligible to be constructed within a particular development unit to the date of issuance of the final occupancy permit for the last dwelling within the same development unit, or one year from the date of issuance of the first building permit for each development unit, whichever occurs later.

²The proposed amendment rewrote the definition of “development phase” to allow the issuance of a building permit in a subsequent subdivision phase one year after the earlier subdivision phase was begun. The promoter of this petition later suggested a definition that would allow a building permit in a subsequent subdivision phase to be issued if no more than 20% of the units within the previous phase or two units, whichever was greater, had not received occupancy permits.

³None of the §19 exemptions apply in this case.

⁴“Participate” means to participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

⁵“Particular matter” means any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

⁶“Financial interest” means any economic interest of a particular individual that is not shared with a substantial segment of the population of the municipality.

See *Graham v. McGrail*, 370 Mass. 133 (1976). This definition has embraced private interests, no matter how small, which are direct, immediate or reasonably foreseeable. See *EC-COI-84-98*. The interest can be affected in either a positive or negative way. *EC-COI-84-96*.

⁷Maloney is deemed to be Walsh's employee even if he worked as a so-called independent contractor for Walsh. See *In re Burgess*, 1992 SEC 570 n.8 (Commission will construe term "employed" broadly to include independent contractor relationships where a significant portion of subject's annual compensation as an independent contractor is derived from that relationship); *EC-COI-83-34* (portion of income earned from business organization and time spent serving organization are factors determining whether official is "employee").

⁸The Supreme Judicial Court has determined that participation for purposes of the conflict of interest law involves more than just voting, and includes any significant involvement in a discussion leading up to a vote. See *Graham v. McGrail*, 370 Mass. 133, 138 (1976).